

prosecution. On the other hand, from the beginning of the case until the end, the burden remains upon the prosecution to prove the guilt of the accused. *Rajoo v. Rex*.⁽⁵⁾ In the present case the prosecution had failed to discharge the burden to the end.

For the reasons stated above, the appeal is dismissed.

Appeal dismissed.

Solicitors : *Karpal Singh & Co.*

DATIN PEGGY LILIAN TAYLOR v. LEONG YUET YENG & ANOR.

[O.C.J. (Siti Norma Yaakob J.) March 28, 1985]

[Kuala Lumpur — Civil Suit No. P.62 of 1983]

Probate and Administration — Letters of Administration granted to plaintiff — Whether schedule of assets should identify debt as asset of estate to enable plaintiff to claim debt against defendants.

The plaintiff, administratrix of the estate of her husband, Eric Taylor, deceased, sought to recover \$65,625.00 being debt due from the defendants as the administratrix and administrators of the estate of Lim Chooi Seng, deceased.

The plaintiff entered judgments against the first and second defendants on September 13, 1984, but not against the third defendant as he was no longer one of the administrators. On November 20, 1984, she had filed a notice of discontinuance of this action against him.

In an application to have the writ of summons and statement of claim as well as the default judgment entered against the first and second defendants set aside, the latter admitted that they had all along been willing and ready to make payment of the sum claimed provided the plaintiff produce the full grant of Letters of Administration with the schedule of assets identifying the debt as an asset of the estate and the certificate from the Collector that estate duty had either been paid or payment of it postponed so that the plaintiff can give a valid receipt for the debt. As the plaintiff had failed to do so despite several demands being made to that effect, she had no capacity to sue the defendants and therefore the writ of summons and the proceedings that ensued were a nullity. The facts revealed that the plaintiff had sent the grant of Letters of Administration to the defendants but they refused to accept it as the debt claimed did not form part of the assets of the deceased. Subsequently, the plaintiff had, prior to the filing of the present action, filed a corrective affidavit with the Collector of Estate Duty disclosing the debt as another item of asset. The defendants, however, claimed that the production of such a Certificate at the later stage was not good enough as it should have been done before this action was filed.

A Held, dismissing the defendants' application: as the grant itself gives the plaintiff the necessary powers to administer the estate, it is immaterial that the schedule did not identify the debt as an item of asset as it is merely evidence as to whether estate duty is payable or not payable by the estate. Thus at the time when the writ was filed, the plaintiff had the necessary capacity to sue and she could give a valid receipt for the debts.

B Cases referred to

- (1) *Chia Teck Liang v. Tan Soo Kiang* [1936] M.L.J. 185.
- (2) *Comptroller of Income Tax v. Yan Tai Min* [1965] 1 M.L.J. 255.
- (3) *P. Govindasamy Pillay & Sons Ltd. v. Lok Seng Chai & Ors.* [1961] M.L.J. 89.

C

CIVIL SUIT.

Ms Theresa Chong Siew Lin for the defendants/applicants.

D *G. Krishnan* for the plaintiff/respondent.

Cur. Adv. Vult.

E Siti Norma Yaakob J. : The plaintiff in this action is the administratrix of the estate of her husband, Eric Taylor, deceased, and she brings this action to recover \$65,625.00 being a debt due from the defendants as the administratrix and administrators of the estate of Lim Chooi Seng, deceased. Service of the writ of summons and statement of claim was effected on all three defendants by way of substituted service and when they failed to appear, the plaintiff entered judgments against the first and second defendants on September 13, 1984, but not against the third defendant as she had already been informed on February 20, 1983 that he was no longer one of the administrators and on November 20, 1984, she had filed a notice of discontinuance of this action against him.

H However, before the filing of the notice of discontinuance, all three defendants had on October 16, 1984, filed an application to have the writ of summons and statement of claim as well as the default judgment entered against the first defendant set aside. In a supplementary affidavit filed by their solicitors, the defendants also seek to have the judgment in default entered against the second defendant set aside and despite objections raised, I had read into the defendants' application another prayer that the default judgment entered against the second defendant be also set aside as the circumstances surrounding the entries of these two default judgments were similar and that the solicitors for the defendants were only aware after the filing of their application that judgment in default

of appearance had also been entered against the second defendant.

In their affidavit in support of their application, the defendants admit that they had all along, even before the filing of this action, been willing and ready to make payment of the sum claimed provided the plaintiff produce the full grant of Letters of Administration with the schedule of assets identifying the debt as an asset of the estate and the certificate from the Collector that estate duty has either been paid or payment of it postponed so that the plaintiff can give a valid receipt to the debt. As the plaintiff had failed to do so despite several demands being made to that effect, she has no capacity to sue the defendants and therefore the writ of summons and the proceedings that ensued are a nullity.

By way of a reply, the plaintiff exhibited the grant of Letters of Administration dated March 21, 1978, together with the Collector of Estate Duty's schedule listing the deceased's assets and the Collector's certificate of postponement. She had sent this grant to the defendants but they refused to accept it as the debt claimed does not form part of the assets of the deceased. In this respect, the plaintiff had, prior to the filing of this action, filed a corrective affidavit with the Collector of Estate Duty disclosing the debt as another item of asset and the Collector has since issued her with his Certificate of Postponement of payment of estate duty and has acknowledged the debt as another item of the deceased's assets and this Certificate was produced to me at the hearing of the application. The defendants replied that the production of such a Certificate at that late stage is not good enough as it should have been done before this action was filed.

To support her contention that the plaintiff has no *locus standi* to bring this action, Counsel for the defendants referred me to the following cases: *Chia Tet Liang v. Tan Soo Kiang*,⁽¹⁾ *Comptroller of Income-tax v. Yan Tai Min*,⁽²⁾ *P. Govindasamy Pillay & Sons Ltd. v. Lok Seng Chai & Ors.*⁽³⁾ In all these cases, the parties to the action are either suing or being sued in their representative capacities and in each case, although the grant of Letters of Administration had been granted, it was however not extracted at the time of the filing of the action and as such, the parties were not clothed with their representative capacities to have acquired titles to the estates. These cases are distinguishable from the facts of the case before me as at January 22, 1983 when she issued the writ of summons, the

A plaintiff was already in possession of a valid grant of Letters of Administration as the Court had appointed her an administratrix on March 21, 1978 and she had extracted the grant on November 5, 1980, the only thing amiss was that the debt claimed is not identified as an item of asset in the schedule of assets attached to the grant.

B The schedule of assets is prepared by the Collector of Estate Duty on information supplied and received by him and it is upon the compilation of the value of such assets that the collector determines whether the estate is exempt from payment of estate duty or if it is liable to payment of estate duty, he calculates the amount payable and upon payment of such duty, he issues his certificate of payment. It is only upon payment of such duty that the administrator can extract the grant of Letters of Administration, unless the Collector decides instead to issue a certificate of postponement of payment, thereby enabling the administrator to extract the grant of Letters of Administration so as to enable him to administer the estate with a view of settling the estate duty payable. Thus in every grant of Letters of Administration, there is, attached to the grant, the schedule of the deceased's assets as well as the Collector's certificate that either the estate is exempt from payment of estate duty or payment of estate duty is postponed or estate duty has been settled in full. Thus the schedule of assets and the Collector's Certificate do not state the status and powers of the administrator. Such powers are found under section 39(2) of the Probate and Administration Act 1959 which states that upon the grant of administration by the Court, all the movable and immovable property of a deceased person vest with the administrator. Looking at the Letters of Administration that was granted to the plaintiff, it clearly states that as an administratrix, she is to administer "all and singular the movable and immovable property of the deceased situate within the jurisdiction". As the grant itself gives the plaintiff the necessary powers to administer the estate, I consider it immaterial that the schedule did not identify the debt as an item of asset as it is merely evidence as to whether estate duty is payable or not payable by the estate. Thus, at the time when the writ was filed, the plaintiff had the necessary capacity to sue and she could give a valid receipt for the debt.

The plaintiff had also raised a procedural objection that under 0.12 r.6 of the Rules of the High Court 1980, the first and second defendants need to obtain leave of the Court to enter appearance before they can apply to set aside the default judg-

ments and the writ of summons. I do not consider that O.12 r.6 has any bearing on the conduct of this application as the procedures for setting aside default judgments and the writ of summons are governed by O.13 r.8 and O.12 r.7(1) of the Rules. These two rules do not require the defendants to obtain leave of the Court as a precedent to their application of setting aside the default judgments or the writ of summons. They are at liberty to apply to have such judgments and the writ set aside by the filing of a summons in chambers supported by an affidavit which they have done in this case and procedure-wise, I do not see anything wrong with the steps taken by the defendants to have the default judgments and the writ of summons set aside.

As I have already ruled above that the plaintiff had the capacity to sue at the time the writ was issued and she can give a valid receipt for the debt and since the default judgments have not been shown to have been irregularly obtained, I had dismissed the defendants' application with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Krishnan & Co.*

R. SARASWATHY v. R. PALAKRISHNAN

[O.C.J. (Siti Norma Yaakob J.) April 12, 1985]

[Kuala Lumpur – Originating Summons No. F. 533 of 1984]

Family Law – Application for custody and for maintenance of child – Application made under Law Reform (Marriage and Divorce) Act, 1976 – No pending action for divorce – Application dismissed – Law Reform (Marriage and Divorce) Act, 1976, ss. 88(3) & 93(1).

In this case the plaintiff claimed custody of her infant son under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 as well as maintenance for him under section 93(1) of the Act, from the defendant, her husband. The parties had separated and the plaintiff and her son were living separately from the defendant in her parents' home. There was no pending action for divorce between the parties.

Held: (1) as there was no pending action for divorce neither section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 nor section 93(1) can be invoked;

(2) the plaintiff should have made her application for custody under section 5 of the Guardianship of Infants Act, 1961 but there was no evidence in this case to show

A that the defendant was unfit to retain custody of his son or that he had abandoned the custody of his son altogether;

(3) the application for maintenance should have been made under section 3 of the Married Women and Children (Maintenance) Act, 1950, but there was no evidence to show that the defendant had neglected or refused to maintain his son;

B (4) both on procedure and on the merits, the application should be dismissed.

[*Editorial note:* This case is under appeal to the Supreme Court in M.A. Rayuan Sivil No. 68 of 1985.]

C ORIGINATING SUMMONS.

S.P. Ranjan for the plaintiff.

M.S. Murthi for the defendant.

Cur. Adv. Vult.

D **Siti Norma Yaakob J.:** In this Originating Summons, the plaintiff seeks custody of her infant son as well as maintenance for him from the defendant, her husband. The parties to these proceedings were married on November 30, 1974 at the Registry of Marriages, Kuala Lumpur and they commenced cohabitation after they underwent a Hindu marriage ceremony on September 6, 1975. The only issue of the marriage, their infant son and the subject matter of these proceedings was born on February 6, 1979 and at the hearing of this application, he was just 2 weeks away from his 6th birthday.

In December 1980 when the infant was less than a year old, the plaintiff was forced to take him away from the matrimonial home to her parents' home following differences she had with the defendant. However, in an effort to save their marriage, she moved back into the matrimonial home together with their son in November, 1981. Even this did not resolve their matrimonial differences and 2 years later, in December 1983, when their son was about 4 years old, the plaintiff, with the consent of the defendant, moved out of the matrimonial home again to live with her parents, taking along her infant son with her. Since that date, she and her son had been living separately from the defendant in her parents' home.

I The plaintiff makes this application under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 (the Act), wherein she seeks to take advantage of the rebuttable presumption under the section that custody of a child below the age of 7 years should go to the mother of the child. As there is no pending action for divorce